

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CITY OF LYNNWOOD, a
Municipal Corporation,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 86-4

ORDER GRANTING
SUMMARY JUDGMENT

THIS MATTER came before the Board on cross motions of the parties. Oral argument was heard before members, Wick Dufford (presiding) and Lawrence J. Faulk on May 19, 1986. Gayle Rothrock, member, has reviewed the record.

PROCEDURAL BACKGROUND

On January 8, 1986, appellant City of Lynnwood, appealed Order No. DE 85-800 issued by the respondent Department of Ecology. The Order set forth a compliance schedule for the achievement of effluent limitations based on secondary treatment for the discharge of

1 municipal sewage. Ecology requested a formal hearing. On April 14
2 1986, Lynnwood filed a Motion for Summary Judgment and Ecology filed a
3 Motion to Dismiss based on Civil Rule 12(b)(6).

4 The parties are agreed that there are no issues of material fact.
5 We treat Ecology's motion as a cross motion for summary judgment.

6 MATERIAL CONSIDERED

7 In reaching its judgment herein, the Board considered the
8 following:

- 9 1. Order No. DE 85-800, dated December 3, 1985 - Ecology
- 10 2. Notice of Appeal - Lynnwood
- 11 3. Request for Formal Hearing - Ecology
- 12 4. Memorandum in Support of Motion for Summary Judgment-Lynnwood
- 13 5. Declaration of Patrick M. Curran
- 14 6. Affidavit of William E. Nims, with attachment
- 15 7. Ecology's Memorandum in Support of Motion to Dismiss
- 16 8. PCHB No. 84-206, October 4, 1985 (Lynnwood v. DOE)

17 UNDISPUTED FACTS

18 1. The City of Lynnwood owns and operates a sewage treatment
19 plant which at present is not meeting effluent limitations based on
20 secondary treatment.

21 2. In 1984, Ecology refused to concur in Lynnwood's application
22 to the United States Environmental Protection Agency for a waiver of
23 the secondary treatment requirement for public owned treatment works
24 under section 301(h) of the federal Clean Water Act.

25 3. Ecology's refusal to concur in a waiver for Lynnwood was
26 appealed to this Board and after hearing was affirmed in a decision
27 issued October 4, 1985. (Lynnwood v. DOE, PCHB No. 84-206).

4. The decision in PCHB No. 84-206 was appealed to the Snohomish

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County Superior Court and became that court's Cause No. 85-2-04122-2.
A hearing on this appeal is anticipated in the fall of 1986.

5. In December of 1985, Ecology issued its Order No. DE 85-800, an enforcement order issued under state law, setting forth the following compliance instructions for reaching secondary treatment:

1. No later than March 31, 1986, submit a report to the Department of Ecology Northwest Regional Office (NWRO) on the decision of privatization of the Lynnwood treatment facility.
2. No later than January 1, 1987, submit to NWRO, a draft engineering report to provide secondary treatment.
3. No later than March 31, 1987, submit to NWRO, a complete and updated engineering report including SEPA compliance to provide secondary treatment.
4. No later than May 1, 1988, submit to NWRO, 90% complete plans and specifications for construction of secondary treatment.
5. No later than July 1, 1988, submit to NWRO, complete plans and specifications for construction of secondary treatment.
6. No later than September 30, 1988, initiate the contract bidding process.
7. By July 1, 1989, July 1, 1990, and July 1, 1991, submit to NWRO, interim construction status reports.
8. No later than July 1, 1991, complete construction of secondary treatment facilities.
9. No later than December 31, 1991, achieve compliance with secondary treatment effluent limitations.

LEGAL ISSUE

The sole issue presented by Lynnwood's appeal is whether the

1 compliance schedule of Order No. DE 85-800 should be modified o
2 stayed pending the prosecution of the City's appeal of the decision in
3 PCHB No. 84-206. At present, the parties appear to be prepared to
4 take the matter through the Washington State Supreme Court.

5 DISCUSSION

6 Ecology's refusal to concur in Lynnwood's waiver application
7 involves the premise that state law precludes a consideration of the
8 water quality impacts (or lack of impacts) of waste treatment. If
9 PCHB No. 84-206 were reversed on this point, Ecology would, most
10 likely, be obliged to re-evaluate whether to concur in the waiver in
11 light of a water quality impacts analysis.

12 In Lynnwood's view, the issuance of Order No. DE 85-800 put the
13 City in a position requiring action to preserve the fruits of its
14 appeal in PCHB No. 84-206. The concern is that, if the City prevails
15 on appeal of the waiver decision, it might nonetheless be faced with
16 the argument that it must comply with a schedule it did not
17 challenge. A secondary concern is that Ecology might attempt to rely
18 on the unchallenged order in refusing to conduct a good faith review
19 of Lynnwood's waiver application on the merits.

20 The fear that Ecology might not see fit to abide by a ruling of
21 the Washington Supreme Court specifying what matters to consider in
22 processing a waiver application is startling. We have no reason to
23 believe that this state agency would try to flout the authority of the
24 state's highest court. There is nothing in the record to indicate
25 that the Department of Ecology is moved by the ghost of Andrew Jackson

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1 However, the City's apprehension over the enforceability of the
2 compliance schedule is well-founded. Under the federal Clean Water
3 Act, the pendency of a section 301(h) waiver application does not
4 shield a municipality from liability for failure to conform with the
5 Act's otherwise applicable secondary treatment standards. United
6 States v. Metropolitan District Commission, _____ F. Supp. _____, 23
7 ERC 1350 (1985). The state water pollution control act is at least as
8 stringent as its federal counterpart. Bellingham v. Department of
9 Ecology, PCHB No. 84-211 (June 19, 1985).

10 Accordingly, the City is liable to agency enforcement (and third
11 party suit) so long as it has neither obtained a waiver nor achieved
12 secondary treatment by the applicable statutory deadline (either July
13 1, 1977 or July 1, 1988 - see 33 U.S.C. 1311(b)(1)(B) and 1311(i)).
14 Any extension of time granted by Ecology is purely a matter of
15 prosecutorial discretion.

16 Order No. DE 85-800 is an example of this prosecutorial
17 discretion. It is a compliance schedule for achieving secondary
18 treatment by the end of 1991. Construction is not contemplated to
19 start until 1989. There is nothing before us to indicate that Ecology
20 has in any sense abused its discretion in setting this schedule.
21 Lynnwood professes that it is capable of meeting the time limits set.

22 The federal law (made applicable through RCW 90.48.160 and 162)
23 would appear to severely restrict the influence of equitable
24 considerations, such as the argument about losing the fruits of the
25 waiver appeal. But we are not convinced, in any event, that the

1 equities of the situation call for an order issued at this time
2 indefinitely delaying any action on the part of the City toward
3 reaching secondary treatment.

4 We are aware that our decision here can itself be appealed to
5 Superior Court and then be taken up at the same time the appeal in the
6 waiver decision is considered. Perhaps the passage of more time will
7 cast a different light on the propriety of Ecology's choice of remedy.

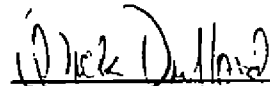
8 We however, conclude that it is now inappropriate for us to enter
9 a judgment which has the effect of modifying or staying Ecology's
10 compliance schedule. Therefore, we render judgment for the agency.
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ORDER


The Department of Ecology's Order No. DE 85-800 is affirmed.

DONE this 19th day of June, 1986.

POLLUTION CONTROL HEARINGS BOARD


WICK DUFFORD, Lawyer Member

 6/18/86
LAWRENCE J. FAULK, Chairman


GAYLE ROTHROCK, Vice-Chairman

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